Case No. SC86269

IN THE MISSOURI SUPREME COURT

KAREN TRIMBLE, D/B/A A-ADVANCED BAIL BONDS,

Respondent/Cross-Appellant

v.

TREVEILLIAN HEARTFELT and TIMMI ANN PRACNA,

Appellant/Cross-Respondent

ON TRANSFER AFTER OPINION OF THE MISSOURI COURT OF APPEALS SOUTHERN DISTRICT

RESPONDENT/CROSS-APPELLANT'S SUBSTITUTE INITIAL BRIEF

RESPONDENT KAREN TRIMBLE REQUESTS ORAL ARGUMENT

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ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the Circuit Court of Greene County, Missouri, by the Honorable Don Burrell, after retrial of the matter upon order of this Court. This action was retried on the Plaintiff's Second Amended petition for damages against defendants Timmi Ann Pracna and Treveillian Heartfelt. This Court had previously determined that the Defendant Timmi Pracna was liable to the Plaintiff upon Count 1 the contract count of the Petition and a retrial was needed to determine damages. Defendant Treveillian Heartfelt was determined to be liable upon Count 1 by an interlocutory judgment of default.

A judgment for damages in favor of plaintiff and against defendants was entered on March 11, 2003. On April 14, 2003, Plaintiff Karen Trimble filed her Notice of Appeal.

This appeal does not involve the validity of any treaty or federal statute, the validity of a statute or provision of the Constitution of Missouri, construction of the revenue laws of the State of Missouri, title to any state office or any offense punishable by a sentence of death or life imprisonment. Therefore, under Article V, Section 3 of the Constitution of Missouri, the Missouri Court of Appeals, Southern District, has general appellate jurisdiction, to hear this appeal.

The Supreme Court accepted transfer of this case after opinion by the Missouri Court of Appeals, Southern District on September 28, 2004.

STATEMENT OF FACTS

I. Prior Appeal

This case was the subject of a previous appeal before this Court. That appeal arose from a judgment which was entered on August 19, 1999 denying plaintiff Karen Trimble any damages on her claim for breach of contract, except for her costs of the action, and a finding in favor of defendant Pracna on plaintiff's claim for fraud and conspiracy. In addition, the Court found favor of the Plaintiff Karen Trimble on all of the Defendant Timmi Pracna's counterclaims. See, Trimble v. Pracna, 51 S.W.3d 481 (Mo.App. S.D. 2001) (herein referred to as "Trimble I"). In Trimble I, this Court reversed the trial court judgment and directed a retrial for damages only on plaintiff's claim for breach of contract against defendant Pracna and a complete retrial on plaintiff's claim for breach of contract against Defendant Heartfelt, and as to both liability and damages on plaintiff's claim for fraud and civil conspiracy against defendant Pracna only. In an opinion on the Defendant Pracna's motion for rehearing, this Court found that there would be no retrial of the issue raised in Defendant Pracna's counterclaim where she claimed credit for a payment of $58,500 to the Plaintiff Karen Trimble.

II. Retrial

Following the decision in Trimble 1, plaintiff filed her Second Amended Petition, restating her claims for breach of contract, fraud and civil conspiracy, and adding a claim for abuse of process. (L.F. 25-63) Defendant Pracna filed an

answer alleging a set-off of $58,500 against any claim of the Plaintiff under the contract and an amended counterclaim seeking a refund for an overpayment and damages for conversion. (L.F. 64-100) The trial court granted plaintiff's motion to strike defendant Pracna's counterclaim before trial (L.F. 19) and plaintiff dismissed her claim for abuse of process voluntarily before trial commenced. (L.F. 287)

On February 14, 2002, the trial court entered an Interlocutory Judgment against the Defendant Treveillian Heartfelt for liability only upon Count 1 of Plaintiff's Second Amended Petition by default. (L.F. 185)

At the conclusion of the jury trial, plaintiff elected to submit her claim for breach of contract and her claim for fraud, but did not submit her claim for civil conspiracy. (L.F. 300-322) The jury returned a verdict on plaintiff's breach of contract claim for damages in the amount of $144,420, and found in favor of plaintiff on her claim for fraud and assessed damages against Ms. Pracna in the amount of $28,900. The jury also assessed
punitive damages against defendant Pracna in the amount of $146,000. Following the verdict, the trial court assessed attorneys' fees of $48,380.70, and expenses of $12,324.67 against defendants Pracna and Heartfelt on plaintiff's claim for breach of contract making the total judgment on plaintiff's breach of contract claim $152,429.92 (after applying a $58,500.00 set-off), and $174,900 on the fraud claim. The Court also awarded the Plaintiff her costs of the action in the amount of

$5,804.55 The final judgment was entered on March 11, 2003 (L.F. 323-327) and the court overruled all post trial motions on April 4, 2003. (L.F. 24) Defendant Pracna then filed her Notice of Appeal on April 19, 2003. (L.F. 24, 418-496) Plaintiff Trimble filed her Notice of Appeal on April 14, 2003. (L.F. 24,497-512)

III. Past History and relationship of Treveillian Heartfelt and Timmi Pracna

Timmi Pracna met Treveillian Heartfelt in Ketchum, Idaho in October of 1988. (T-1052) Later that same year Timmi Pracna and Treveillian Heartfelt became lovers and he began to live with her. (T-1053)In March 1989, Timmi Pracna and Treveillian Heartfelt flew to Miami, Florida with the intent to fly on to Brazil to retrieve a boat allegedly owned by Treveillian Heartfelt. While at the airport in Miami, Heartfelt abandoned Timmi Pracna.
(Exhibit 36) Upon returning home, Timmi Pracna discovered that there were checks missing from her checkbook and that she had found that they had been signed and cashed by Treveillian Heartfelt. (Exhibit 36) Whereupon, Timmi Pracna had forgery charges filed against Treveillian Heartfelt. (T-1057/1059)

In April, 1989, Timmi Pracna advised the Blaine County Idaho Sheriff's Department that Heartfelt had called her and had stated that he was sorry about the checks that he had stolen and he would send money at a later date. (Exhibit 36) Heartfelt contacted Timmi Pracna from jail in Arizona in January 1990. (T-1338) Timmi Pracna had Heartfelt returned to Ketchum, Idaho and he was arrested and jailed on the forgery of her checks. (T-1340)

After Heartfelt was returned to Idaho, Timmi Pracna bonded Heartfelt out of the Blaine County Idaho jail from a variety of charges that he was facing. (T-1341) During the time he was bonded out, one of the conditions of his bail was that he live with Timmi Pracna. The first bond was under the alias of Rick Arden Williams, on a charge from the State of Idaho for defrauding, forgery, grand theft, false pretenses and stolen property. (Exhibit 46-A) An additional bond was for posted by Pracna for Francis Everhart a/k/a Treveillian Heartfelt for possession of cocaine for sale. (Exhibit 46-B) The next bond she posted was for forgery of Timmi Pracna's checks under the name of Treveillian Heartfelt. (Exhibit 46-C) The next bond she posted was for Guenther Chance Edelbauer a/k/a Chance Heartfelt for burglary in the first degree. (Exhibit 46-D)

Thereafter, Treveillian Heartfelt failed to appear at least one of his Hearings in the State of California and the bond, under the name of Francis Everhart, was forfeited. (Exhibit 46-E) Timmi Pracna acknowledged the bond forfeiture and the difficulties that it caused her, in her letter to Treveillian Heartfelt in August 1990. (Exhibit 67; A-1). That bond was later reinstated and released.

Heartfelt was convicted on a plea bargain, in the State of Idaho, on reduced charges, which included forgery of Timmi Pracna’s checks and burglary and sent to prison in the state of Idaho. (T-1341) While Treveillian Heartfelt was in prison, Timmi Pracna continued to see him, write him and write letters on his behalf. On several occasions, Timmi Pracna advised the Parole Commission for the State of

Idaho, that she was willing to provide Treveillian Heartfelt with a home and to be of assistance with employment. (Exhibits 32-A and 32-B) She also attended parole meetings at which she acknowledged his use of aliases, such as Rick Williams and acknowledged that he was guilty of the crimes in California. (Exhibit 32-C)

Treveillian Heartfelt was finally released from prison on February 9, 1995, and one of the conditions was that Treveillian Heartfelt live with Timmi Pracna in her home. (T-1345) Treveillian Heartfelt agreed to work for Timmi Pracna and work off $500 a month as room and board. (T-1166) He remained with Timmi Pracna until approximately June 12, 1995. (T-117)

According to Timmi Pracna, Treveillian Heartfelt left and took her Jeep on June 12, 1995. He then called her several days later from Twin Falls, Idaho, and asked her to meet him there. After she drove there, she received another call from him from Jackpot, Nevada and she met Treveillian Heartfelt in Jackpot, Nevada. (T-1173) At that time, Treveillian Heartfelt was on parole and Pracna knew he was not supposed to leave the state of Idaho without written permission from his parole officer. Timmi Pracna indicated that she asked him to come back with her and that he promised to return with her, but that he never showed up after he went to make a phone call, and did not return with her to Idaho. (T-1174)

Upon returning home, Timmi Pracna reported her conversations with Heartfelt and the above events to the Blaine County, Idaho, Sheriff's Department and his parole officer. She reported that Treveillian Heartfelt had stolen her Jeep, a number

of her checks and various belongings, guns and cellular phones. The next day, Timmi Pracna went back to the Blaine County, Idaho, Sheriff's Department and reported that she was mistaken about the stolen Jeep and that she had found it and all the items she had reported stolen, in the Jeep. She also claimed she had forgotten that she had had Treveillian Heartfelt write the checks while she was suffering from tennis elbow and could not write checks. (Exhibit 41) However, in her testimony at this trial, Defendant Pracna admitted that she did not get her Jeep back from Heartfelt until after June 30. She admits that she saw him in Reno, Nevada on June 30 and gave him money. (T-1217; T-1192/1193; Exhibit 435; A-21) Her sworn testimony previously was that she had not seen Heartfelt after he left her in Jackpot on June 18, and did not see him in Reno. (T1218/1219) She also admitted that her statement to the sheriff in Exhibit 41 that she had all of her property and the Jeep back was false. (T-1491/1494)

After leaving Idaho, Treveillian Heartfelt went to Reno, Nevada, where he met Caroline Denise Harper-Hanson on June 12, 1995. (T-1901) During the next five or six weeks, Treveillian Heartfelt lived with Caroline Hanson in Reno. (T-1901)

On June 30, 1995, Ms. Hanson reserved a room at the Executive Inn in Reno, Nevada, for a person by the name of Timmi Pracna. (T-1902) Timmi Pracna told Caroline Hanson that she had come to Reno and that she had brought Treveillian Heartfelt a lot of money. (T-1902) In Exhibit 201, (A-19) an August, 1995, memo from Timmi Pracna to one of the bounty hunters looking for Treveillian Heartfelt, in

paragraph 5, Timmi Pracna indicates that during last month before he jumped bail in Missouri, that Treveillian Heartfelt had received $650 from Timmi Pracna. Timmi Pracna also told Randall Wood in a letter Exhibit 435, that she met Heartfelt in Reno and gave him money.

Treveillian Heartfelt left Caroline Hanson on July 9, 1995, driving a Lincoln Town Car, which Caroline Hanson had rented for him. (T-1903) Treveillian Heartfelt was arrested in Taney County, Missouri, on July 23, 1995, on a warrant from the state of Nevada for the charge of driving a stolen rental car, the Lincoln Town car. (T-1351)

IV. Posting the bond

On July 23, 1995, Treveillian Heartfelt called Timmi Pracna from the Taney County jail and indicated that he was in jail for overdue rental car. (T-1351) Timmi Pracna, with her two 15 year old children, drove from Ketchum, Idaho, to Branson, Missouri, arriving on August 10, 1995, and saw Treveillian Heartfelt in jail. (T-1352)

On August 11, Timmi Pracna went to Karen Trimble for the purposes of having Karen Trimble post a bail bond for Defendant Treveillian Heartfelt. (T-1354) The first bond on Treveillian Heartfelt was for $25,000. (Exhibit 3) Timmi Pracna understood that she would have to pay the premium of 10% on the fact amount of the entire bond. (T-3/4)

Timmi Pracna told Karen Trimble that she was on her way to Tennessee with Treveillian Heartfelt to close a deal in which he was giving her title to 1000 acres of land. (T-67; T-98) Karen Trimble explained to Timmi Pracna that she would have to have property to secure the bond as collateral.

(T-35) Karen further explained to Timmi Pracna that Timmi Pracna would have to fill out and sign the A-Advanced Bail Bond Application and Contract form (Exhibit 1) and gave it to Ms. Pracna, who read it. (T-36)

Prior to going to Forsyth, Missouri, to bond Treveillian Heartfelt out of jail, Karen Trimble had prepared a Note and a First Deed of Trust and these were signed by Timmi Pracna. (Exhibit 5 & 6; T-65/66)

After arriving at the jail in Taney County, Karen Trimble was approached by Dianna Long, the Assistant Prosecuting Attorney and told that Treveillian Heartfelt had a long F.B.I. rap sheet and that Karen Trimble and Timmi Pracna shouldn't bond him out. (T-76) Timmi Pracna represented to Karen that the story about the long F.B.I. rap sheet was a lie and further that Treveillian Heartfelt had never missed a court date and that the aliases indicated by Diana Long were not true. (T-76/77)

During the discussions with Treveillian Heartfelt, Heartfelt and Pracna told Karen Trimble that they had a truck load of artifacts and goods coming to Chicago, that they needed to meet the truck so they could sell the items and that they were worth a great deal of money. Timmi Pracna stated that the truckload of goods also included a car formally owned by Bob Hope that she owned, and other paintings. (T-

74/75) Timmi Pracna filled out the A-Advanced Bail Bond Application and Contract and signed it. (Exhibit 1). Timmi Pracna wrote on the application that she was Treveillian Heartfelt's employer for the last one-half year (T-43) and that the only alias or nickname for Treveillian Heartfelt had was “Chance”. (T-40) Timmi Pracna also represented that Heartfelt had lived with her for the last one-half year (T-42) and that Treveillian Heartfelt had never missed a court date. (T-100) Timmi Pracna failed to tell Karen Trimble that she had bonded Heartfelt out under the names Rick Arden Williams, Francis Everhart, or Guenther Chance Edelbauer or the other aliases he had. (T-227/228)

Before going to the Taney County jail on August 11, Karen and Timmi were informed by the Sheriff's office of a second charge against Treveillian Heartfelt for a bad check, on which a bond of $50,000 had been set. (T-56/57) Timmi Pracna changed and initialed the first Note and Deed of Trust Karen prepared for covering the bonds (Exhibits 5 & 6) and initialed the changes to increase the amount to cover the $75,000.00 in bonds. (T-66) In addition, Timmi Pracna wrote and gave to Karen Trimble a check in the amount of $7,500 for the premium for the two bonds totaling $75,000 for the release of Treveillian Heartfelt. (Established fact by the Order of Court Exhibit 1, Paragraph 9)

After posting the $25,000 and $50,000 bond, Treveillian Heartfelt was released and as the parties were leaving the jail, he was re-arrested on a new fugitive warrant for Idaho parole violations. (T-82/83) The new bond would be an additional

$250,000. (T-86) Karen Trimble did not initially agree to write the additional $250,000 bond and wanted to think on it overnight.

(T-86)

That night Karen Trimble ran credit checks on Treveillian Heartfelt and Timmi Pracna and found that Timmi had perfect credit but that Treveillian Heartfelt did not exist under the social security number they both had given Karen. (T-94) Timmi Pracna called Karen that night and Karen asked Timmi Pracna why Treveillian Heartfelt's social security number did not fit his name. Timmi Pracna told Karen that Treveillian Heartfelt was in the Federal Witness Protection Program because of his prior drug cartel convictions. (T-94/95) After Pracna again requested that Karen write the bond to free Heartfelt, Karen told Timmi Pracna that she would only write the bond if Timmi put up additional property as collateral. (T-99)

Karen Trimble decided she wanted to check out the story of the Federal Witness Protection Program with Treveillian Heartfelt before she would write the bond. Karen met with Treveillian alone the next morning before Timmi could talk with him. Treveillian Heartfelt at Karen's meeting with him, confirmed that the reason his social security number wouldn't match his name was because he was in the Federal Witness Protection Plan because of evidence he had given against the drug cartel. (T-101/103) Since Heartfelt's story matched Pracna's Karen decided to write the increased bond. Karen told Timmi Pracna on August 12 that if Treveillian Heartfelt missed a court date that Timmi would be responsible for the bond amount

and expenses and Timmi Pracna, once again assured Karen that Treveillian Heartfelt had never missed a court date. (T-106)

After Treveillian Heartfelt was released, the parties went to another location to finish the paperwork. When Karen gave the Quit Claim Deeds (Exhibits 8, 9 & 10) to Timmi Pracna to sign as collateral for the Bond Contract (Exhibit 1), there were no limitations or additional writings on them. (T-133) After Pracna had executed the deeds, Timmi Pracna decided to put the limitations on the bonds (T-133) and told Karen that the limitations were needed in case something happened to Karen. (T-133) At this meeting Karen again read and reviewed the conditions of the bond with Treveillian Heartfelt and Timmi Pracna and Karen told them that she would sell the property if Treveillian Heartfelt failed to appear. (T-766) Karen also told Timmi Pracna that the terms of the bond and contract included Timmi's liability for the expenses for getting Treveillian Heartfelt back if he failed to appear for court. (T-777)

Timmi Pracna filled out and then signed Exhibit 7, which was the Note for $325,000. (T-111/112 Thereafter, Treveillian Heartfelt and Timmi Pracna left. Treveillian Heartfelt did appear on August 16 as required by the bonds and the Court. (T-142)

V. <u>The Chase</u>

Timmi Pracna was with Treveillian Heartfelt when he appeared for Court on August 16 as required and both were aware that Heartfelt had to appear again in court

on August 23rd. After Timmi Pracna and Treveillian Heartfelt left the court on August 16, Karen Trimble talked with them on the phone several times during that next week. (T-144/147) After Pracna and Heartfelt left Taney County, Pracna's truck began having problems with the brakes and Pracna rented a car in Nashville. (T-1401/1402)

On August 22, Timmi Pracna told Karen that she and Treveillian Heartfelt had decided that they would take her rental car and leave the evening of August 22nd and drive to Taney County for the court appearance on the August 23rd. (T-1403/1404) Timmi Pracna then testified that after talking to Karen on the phone, she went down to the lake where they were staying to be with her children for awhile, and when she returned, the rental car and Treveillian Heartfelt were gone. (T-1404) At trial, Timmi Pracna testified that Treveillian Heartfelt called her later on August 22, and told her that he had decided that since her daughter was ill, that he would drive by himself to Taney County. (T-1404) Timmi Pracna, in her August 26, 1995, letter (Exhibit 22; A-12) to Karen Trimble, states that she and Treveillian Heartfelt had **jointly** decided that "Chance" would drive back alone and that she would stay in Tennessee with the kids.

On August 23, the day of the court appearance for Treveillian Heartfelt, Timmi Pracna testified that Treveillian Heartfelt called her and reported that the rental car had broken down on the way to Missouri. (T-1406) Timmi Pracna and Treveillian Heartfelt then called Karen Trimble about 6:45 a.m. and reported that the

car had broken down somewhere in Arkansas. (T-1406) Karen was very upset that Pracna was not with Heartfelt, but suggested that they call Hertz to get another car to Heartfelt. Karen Trimble then went to the courthouse and waited all day for Treveillian Heartfelt to show up. He never showed up for his hearing. (T-154) In a panic, Karen Trimble then spent all night trying to find Heartfelt, driving toward Memphis to see if she could find him and going back to Branson. (T-158/159)

Relying on Timmi Pracna's information, Karen Trimble then began the process of looking for Treveillian Heartfelt in Arkansas and around Branson. Timmi Pracna told Karen that Heartfelt was probably in Arkansas around Memphis. (T-152)

Unknown to Karen Trimble, Timmi Pracna, at Heartfelt's request, wired $70 to Treveillian Heartfelt in Alcoa, Tennessee, on the evening of August 23rd at approximately 6:45 p.m. (Exhibit 201; Exhibit 430; A-19; T-964/969; T-398) Karen Trimble testified that if she had known that Treveillian Heartfelt was in Alcoa, Tennessee, on the evening of August 23, she would have immediately had him arrested before he could flee further. (T-161/162)

After leaving Tennessee in August 1995, Treveillian Heartfelt went to the Gainesville, Florida, where he met a woman by the name of Robbie Blake. (T-1094) Ms. Blake met and knew Treveillian Heartfelt by the name of Checoah Destin, which was yet another alias. (T-1094)

During the next several months, Treveillian Heartfelt lived with Robbie Blake. During that time he gave her a $1,000 check to help with expenses and to rent her

garage for his car. This check was from a fraternity in Tennessee, that Heartfelt had stolen. (T-1096/1097) As time went by Treveillian Heartfelt obtained money from Ms. Blake and used Ms. Blake's credit card until such time as he had taken over $40,000 from Ms. Blake. (T-1099; T-1115) To secure this amount he gave her a note using the Timmi's stolen rental car as collateral. (T-1098/1099)

In December 1995, Robbie Blake after obtaining a duffel bag that Heartfelt always had with him, opened it and found out that Checoah Destin was actually Treveillian Heartfelt and that he was on the run from his parole.
(T-1120) After Robbie Blake called the parole officers in Idaho, she found out that Treveillian Heartfelt had stolen a rental car which he was then driving.
(T-1121) From information obtained from Mr. Dan Tiller, the Idaho Parole Officer, Robbie Blake found out about the Missouri bonds and contacted Brenda Warf, Karen's daughter, who worked for the bonding company. Robbie Blake was offered by Brenda Warf, on behalf of Karen and accepted a $15,000 promise of reward for Treveillian Heartfelt if he was caught, because of her information and cooperation. (T-1121/1122) As a result of working with the police and Robbie Blake making various phone calls, the police in Gainesville, Florida, were able to capture Treveillian Heartfelt. At his request, Treveillian Heartfelt was placed in the Alachua County Jail. (T-1124/1125)

Until December 19, 1995, when Treveillian Heartfelt was captured in Gainesville, Florida, a great deal of activity on behalf of Karen Trimble took place in

an attempt to locate Treveillian Heartfelt. Timmi Pracna demanded that Karen Trimble early on hire bounty hunters to find Treveillian Heartfelt, because Timmi kept telling Karen and everyone that Pracna would lose everything if Heartfelt was not found. (T-193/194)

Prior to hiring bounty hunters to begin the look for Treveillian Heartfelt, Karen Trimble went ahead and deposited the initial $7,500 check given to her by Timmi Pracna for the first two bonds on August 29, 1995. (Exhibit 4; A-10) Shortly thereafter, Karen Trimble was informed by her bank that the check was being returned as stolen or forged. (T-203/206, Exhibit 4, A-10) Timmi Pracna admitted to Karen Trimble that she told her bank that this check had been stolen or forged. (T-205) Eventually, Karen Trimble was sent $58,500 by Timmi Pracna on this matter. (Facts established by Court, Exhibit 1, Paragraph 27).

The first bounty hunter was Larry Garrison. Karen Trimble and Timmi Pracna decided to hire him and agreed to paid him $1,000 initially. (T-1410)

As time went by, numerous bounty hunters were hired to attempt to locate Treveillian Heartfelt all the time at the urging of Timmi Pracna. There was a bounty hunter by the name of Tim Bruce who initially worked for Larry Garrison and then went to work for Karen Trimble. Mr. Bruce searched for Treveillian Heartfelt in such locations as Branson, Missouri; Omaha, Arkansas; Alpena, Arkansas; Green Forest, Arkansas; Memphis, Tennessee; Gainesville, Missouri; Nashville, Tennessee; Knoxville, Tennessee. (T-338/344)

In addition to Tim Bruce and Larry Garrison, Karen Trimble on behalf of Timmi Pracna and with her consent, hired Richard Hugh who owns Catch and Retrieve, a bounty hunter service. (T-958) During a conversation with Timmi Pracna and Karen Trimble, Richard Hugh agreed to work for Timmi Pracna and Karen Trimble if they would pay his expenses and for his time or a percentage. Initially, they were to pay him 10% of the bond regardless of whether he caught Treveillian Heartfelt. He later reduced the bill. (T-976) Richard Hugh looked for Treveillian Heartfelt for a number of months in Arkansas; Branson; Memphis; Cookville, Tennessee and Knoxville, Tennessee. (T-961) Throughout this time period, Richard Hugh reported regularly to Timmi Pracna about his travels and where he was and in addition, told her of the types and general amount of expenses were being charged.

Timmi Pracna kept trying to direct where Richard Hugh was to look for Treveillian Heartfelt. During the search, Richard Hugh was told by Timmi Pracna about Treveillian Heartfelt being in Alcoa, Tennessee and Timmi Pracna admitted to Mr. Hugh that she had sent Heartfelt money there.
(T-964) When Mr. Hugh went to Alcoa, Tennessee, he was able to obtain the receipt for the money Pracna wired Treveillian Heartfelt and he sent it to Timmi Pracna. (T-966) When Richard Hugh asked Timmi Pracna if she'd sent any other monies to Treveillian Heartfelt, she admitted that she had but she would not tell him where Heartfelt had been when those monies were sent to Heartfelt. (T-969)

Richard Hugh repeatedly told Timmi Pracna that he wanted to go to Florida to look for Treveillian Heartfelt and in each conversation, Timmi Pracna told Mr. Hugh that there was no reason Treveillian Heartfelt would go to Florida. (T-973) In fact, when Richard Hugh began insisting on going to Florida, Timmi Pracna told him that she would not pay Richard Hugh if he went to Florida. (T-974)

Timmi Pracna suggested to Bill McConnell, the Chief of Police of Ozark, Missouri, in a phone conversation that Richard Hugh should go to New York because she had "found out that Treveillian Heartfelt was going to go to New York and take her daughter out of boarding school". (T-934/936). When Timmi Pracna called Bill McConnell, she was crying and upset and expressed a fear that Treveillian Heartfelt was going to abduct her daughter out of the boarding school in New York. (T-934/936) At trial, Timmi Pracna admitted she never had any children attending school in New York. (T-1169)

When it appeared that Richard Hugh would not go to New York, Timmi Pracna suggested that he go to the area around Muskogee, Oklahoma, where she said Treveillian Heartfelt was with his shaman, Red Cloud, having his soul cleansed in a sweat lodge. (T-974/975) Richard Hugh ended up around Muskogee, Oklahoma at the time Treveillian Heartfelt was actually caught in Gainesville, Florida. (T-975)

A bounty hunter by the name of Tony DeLaughter, worked with Richard Hugh utilized a computer to initiate and perform his searching. DeLaughter initially discussed his working on the case with Karen Trimble, who agreed to take care of his

time and expenses, and this was later confirmed and agreed to by Timmi Pracna. (T-1914) Tony DeLaughter also suggested searching in the state of Florida to look for Treveillian Heartfelt and DeLaughter was also directed to New York or Oklahoma by Timmi Pracna. (T-1929/1930)

Treveillian Heartfelt was eventually returned to Taney County, Missouri on March 25, 1996. (Facts by the Order of the Court, Exhibit 1, Paragraph 30)

VI. After the Chase.

During the time that Heartfelt was on the run, Defendant Pracna told everyone the she was one of his "victims". See Exhibit 202, A-6; Exhibit 22, A-12; Exhibit 200, A-18; Exhibit 430, A-20; and Exhibit 435, A-21.

However, within the first month after Heartfelt's capture, Defendant Pracna was working with him again. First while he was still in Florida, Defendant Pracna tried to work a three way call with Robbie Blake to "get her restitution". (T-1126/1127)

Thereafter, when Heartfelt was returned to Missouri, Defendant Pracna contacted his attorney in Missouri, Eric Farris, numerous times.
She provided him a number of documents, and supported him in his efforts to get Heartfelt released, by claiming that Heartfelt was not the man wanted in the Missouri and Nevada warrants. (T-854) This even included a letter to Eric Farris

from Defendant Pracna in which she describes alleged seizures of cash from Heartfelt when he was arrested in Florida in excess of $3,000,000. Exhibit 446

Heartfelt was then released back to Reno, Nevada by the State of Missouri, in August of 1996. Defendant Pracna then went to Reno, Nevada, and cosigned yet another bail bond, this time for $5,000. (T-1899) She left her truck as collateral with the bail bondsperson. (T-1889) Heartfelt then jumped bail again. (T-1889) After Heartfelt jumped bail, Defendant Pracna tried to avoid paying the $5,000 bond and just get her truck back. (T-1891) In her testimony at this trial, Defendant Pracna denies that she bailed Heartfelt out of jail in Reno, and testified that the bond agent simply took her truck. (T-1435/1437)

After Heartfelt was caught in Marin County, California, he was charged with additional crimes and pled guilty to those crimes. Defendant Pracna sent a letter to his court appointed attorney Bonnie Marmore in which she describes Heartfelt in a very different light than when she was his "victim". Exhibit 203, A-23 Unfortunately for Ms. Marmore, Timmi Pracna also sent her a false FBI report (Exhibit 447), the same one she had sent Eric Farris. The discussion of this report is found in the Marin County sentence hearing transcript found beginning at T-1515.

Defendant Pracna then was involved with Heartfelt in a deal to sell two non-existent motor cycles while he was in jail in California. Randall Fritz was the sheriff's officer that investigated the matter and contacted Pracna. He testified that

she admitted receiving the monies approximately $6,000 from the sale. (T-1029/1030) The documents used by Heartfelt to make the sale were sent to him from the same fax number the Defendant Pracna had used previously in this case. (T-1024)

POINTS RELIED UPON

CROSS APPEAL

POINT 1

THE TRIAL COURT ERRED IN AWARDING A SET-OFF OF $58,500 TO THE DEFENDANT PRACNA AGAINST THE JUDGMENT FOR THE PLAINTIFF TRIMBLE ON COUNT 1 BECAUSE MISSOURI LAW STATES THAT A SET-OFF IS A COUNTERCLAIM IN THAT THIS COURT IN ITS MANDATE AFFIRMED THE JUDGMENT FOR PLAINTIFF KAREN TRIMBLE ON ALL DEFENDANT PRACNA'S COUNTERCLAIMS AND SPECIFICALLY REFUSED TO ORDER A NEW TRIAL FOR DEFENDANT PRACNA ON HER COUNTERCLAIM CONCERNING THE SET-OFF.

Standard Insulation and Window Co. v. Dorrell, 309 S.W.2d 701 (MoApp. 1958)

Edmonds v. Stratton, 457 S.W.2d 228 (MoApp 1970)

First Nat. Bank of Ziegler, Ill. v. Dunbar, 72 S.W.2d 821 (MoApp. 1934)

Morrison v. Caspersen, 339 S.W.2d 790 (Mo. 1960)

Bray v. St. Louis-San Francisco Ry. Co., 259 S.W.2d 132 (Mo.App. 1953)

Tillis v. City of Branson, 975 S.W.2d 949 (Mo.App. 1998)

Outcom, Inc. v. City of Lake St. Louis, 996 S.W.2d 571 (Mo.App. 1999)

CROSS APPEAL

POINT 2

THE TRIAL COURT ERRED IN AWARDING A SET-OFF OF $58,500 TO THE DEFENDANT PRACNA AGAINST THE JUDGMENT FOR THE PLAINTIFF TRIMBLE ON COUNT 1 BECAUSE MISSOURI LAW BARS A CLAIM FOR SET OFF MADE MORE THAN 5 YEARS AFTER IT ACCRUES AND IS BARRED BY *RES JUDICATA* IN THAT THE DEFENDANT PRACNA DID NOT INCLUDE THIS CLAIM FOR SET-OFF IN HER ANSWER UNTIL MORE THAN 5 YEARS FROM ITS ACCRUAL, AND THIS COURT AFFIRMED THE JUDGMENT FOR PLAINTIFF KAREN TRIMBLE ON DEFENDANT PRACNA'S PREVIOUS CLAIM FOR SET-OFF.

RSMo §516.120

Chesterfield Village, Inc. v. City of Chesterfield, 64 S.W.3d 315 (MO 2002)

CROSS APPEAL

POINT 3

THE COURT ERRED IN FAILING TO AWARD THE PLAINTIFF THE COST OF THE TRANSCRIPT FOR THE FIRST APPEAL BECAUSE MISSOURI LAW STATES THAT THE WINNER OF AN APPEAL SHALL HAVE THEIR COSTS AND BECAUSE IT IS A DAMAGE WITHIN THE BAIL BOND CONTRACT IN THAT HAVING WON THE FIRST APPEAL THE COST OF THE FIRST TRANSCRIPT WAS EITHER A COST OR AN EXPENSE RECOVERABLE UNDER THE BAIL BOND CONTRACT.

Supreme Court Rule 84.18

Burdick v. Wood, 959 S.W.2d 951 (MoApp. 1998)

CROSS APPEAL

POINT 4

The trial court ERRED in awarding attorney fees to the Plaintiff upon the bail bond contract at the rate of 33½% on the jury award of $144,420 and not at an hourly method as requested BECAUSE Missouri law would find that the bond contract was NOT ambiguous IN THAT the contract stated that the attorney fees were part of the Plaintiff's damages which arose from prosecuting or defending any action on the contract or protecting the collateral.

Garner v. Hubbs, 17 S.W.3d 922 (MoApp. 2000)

RESPONDENT'S POINTS RELIED UPON

POINT I

The trial court DID NOT ERR in repeatedly sustaining objections to defendant's argument that Ms. Pracna did not owe the $25,000 balance of the bond premium and in telling the jury that Ms. Pracna owed that sum as a matter of law, BECAUSE whether Ms. Pracna owed the premium was not a disputed fact IN THAT this Court in its Mandate and opinion had determined that Ms. Pracna was liable on the contract which was a joint and several liability contract with Mr. Heartfelt and the trial Court in the first trial had determined as a fact established by the order of the Court that the premium for the bail bond was $32,500.

Cohn vs. Dwyer, 959 S.W.2d 839 (Mo.App. 1997)

Fox Midwest Theaters vs. Means, 221 F.2d 171 (8th Cir. 1955);

Illinois Fuel Company vs. Mobile & O.R. Company, 8 S.W.2d 834.

POINT II

The trial court DID NOT abuse its discretion in refusing to submit defendant's withdrawal instruction, Instruction No. B, BECAUSE the withdrawal instruction would not have eliminated the issue of bounty hunter fees not actually paid or incurred by Trimble, IN THAT Instruction No. B would not have properly advised the jury that they should not consider any bounty hunter fees and expenses under Trimble's breach of contract claim because there was substantial evidence to support those fees.

Kenney v. Wal-Mart Stores, Inc., 100 S.W.3d 809, 814, (MO en banc, 2003)

Supreme Court Rule 55.08

Detling v. Edelbrock, 671 S.W.2d 265 (MO 1984)

POINT III

The trial court DID NOT ERR in failing to sustain defendant Pracna's Motion for Judgment Notwithstanding the Verdict (JNOV), BECAUSE plaintiff did prove each essential element of her claim for fraud by substantial evidence, and in particular, the necessary elements that she reasonably relied upon the statements of Ms. Pracna mentioned in the verdict directing instructions (Instruction Nos. 13-17) in either writing the bonds or hiring bounty hunters, that such statements were material to her decision to either write the bonds or hire the bounty hunters, or that she was damaged as a result of any representations of Ms. Pracna set out in the verdict directors, IN THAT this Court has already determined in its Mandate that the Plaintiff Karen Trimble had sufficient substantial evidence to submit her fraud claim against Timmi Pracna as it concerned writing the bonds and there was substantial evidence concerning the issue of the hiring and use of bounty hunters and there was evidence admitted without objection of Plaintiff Karen

Trimble testified concerning the value of her time spent actually looking for Heartfelt and defending her collateral.

Giddens v. Kansas City Southern Railway Company, 29 S.W.3d 813 (Mo. Banc 2000)

Trimble v. Pracna, 51 S.W.3d 481 (MoApp., 2001)

Bigler vs. Conn, 959 S.W.2d 134, 138 (Mo.App. 1998)

Tietjens vs. General Motors Corp., 418 S.W.2d 75 (MO 1967)

Cantrell vs. Superior Loan Corp., 603 S.W.2nd 627, 637 (Mo.App. 1980)

Cabinet Distributors, Inc. v. Redmond, 965 S.W.2d 309, 313 (Mo.App. 1998)

Hart v. Wood, 392 S.W.2d 20 (MoApp. 1965)

POINT IV

The trial court DID NOT ERR in submitting Instruction No. 13 BECAUSE the instruction was supported by substantial evidence and it did not confuse, mislead or misdirect the jury IN THAT there was evidence that plaintiff was told by Heartfelt and Pracna that Mr. Heartfelt had not used aliases and that fact was relied upon and it was material to plaintiff when she wrote the bail bonds for him.

Giddens v. Kansas City Southern Railway Company, 29 S.W.3d 813 (Mo. Banc 2000)

Trimble v. Pracna, 51 S.W.3d 481 (MoApp., 2001)

Bigler vs. Conn, 959 S.W.2d 134, 138 (Mo.App. 1998)

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Cabinet Distributors, Inc. v. Redmond, 965 S.W.2d 309, 313 (Mo.App. 1998)

POINT V.

The trial court DID NOT ERR in submitting Instruction No. 15, BECAUSE Instruction No. 15 DID NOT misdirect, mislead, or confuse the jury and thereby prejudiced defendant Pracna by permitting the jury to return a verdict against her, IN THAT (a) it was permitted for plaintiff Trimble to recover damages on her fraud and contract claims despite the fact that the same facts supported each claim as long as the damages were not doubled thereby, and (b) the requisite elements of falsity, materiality, reliance, and damages were proven by substantial evidence.

Vogt v. Hayes, 54 S.W.3d 207, 211 (Mo.App. 2001)

Beer v. Martel, 55 S.W.2d 482, (MO 1932)

Greenwood Ranches, Inc. v. Skie Constr. Co., 629 F.2d 518, 521 (8th Cir. 1980)

R.J.S. Security, Inc. v. Command Security Services, Inc.,
101 S.W.3d 1 (Mo.App. 2003)

Boyd v. A.E. Margolin, 421 S.W.2d 761 (MO 1967)

Citizens Bank of Appleton City v. Schapeler, 869 S.W.2d 120 (MoApp. 1993)

POINT VI

The trial court DID NOT ERR in awarding attorney fees of 33½% ($19,597.50) on the $58,500 paid by Ms. Pracna immediately after Mr. Heartfelt fled BECAUSE the bond contract was NOT ambiguous IN THAT the contract stated that the attorney fees were part of the Plaintiff's damages which arose from prosecuting or defending any action on the contract or protecting the collateral.

Garner v. Hubbs, 17 S.W.3d 922 (MoApp. 2000)

Standard Insulation and Window Co. v. Dorrell, 309 S.W.2d 701 (MoApp. 1958)

CROSS APPEAL

POINT 1

THE TRIAL COURT ERRED IN AWARDING A SET-OFF OF $58,500 TO THE DEFENDANT PRACNA AGAINST THE JUDGMENT FOR THE PLAINTIFF TRIMBLE ON COUNT 1 BECAUSE MISSOURI LAW STATES THAT A SET-OFF IS A COUNTERCLAIM IN THAT THIS COURT IN ITS MANDATE AFFIRMED THE JUDGMENT FOR PLAINTIFF KAREN TRIMBLE ON ALL DEFENDANT PRACNA'S COUNTERCLAIMS AND SPECIFICALLY REFUSED TO ORDER A NEW TRIAL FOR DEFENDANT PRACNA ON HER COUNTERCLAIM CONCERNING THE SET-OFF.

The trial Court in this case specifically awarded to the Defendant Pracna a set-off of $58,500 against the Plaintiff Karen Trimble on her award in Count 1. (LF-326) Plaintiff had previously objected to awarding Defendant Pracna any amount on a set-off, and had filed a Motion to Strike this claim from Defendant Pracna's Answer to the Plaintiff's Second Amended Petition. The issue of whether any amount for set-off was to be awarded was reserved for the trial Court at the time of the instructions to the jury, to prevent any confusion as to what amounts were being considered by the jury.

The trial Court in the first trial found in its Judgment as follows:

"IT IS FURTHER ORDERED, ADJUDGED and DECREED that on Defendant's Counterclaims (Pracna) VI and IX (this was the money had and received claim) against Plaintiff, as submitted on Verdict B and C, judgment is hereby entered in favor of Plaintiff and against Defendant Pracna.

IT IS FURTHER ORDERED, ADJUDGED and DECREED the Counts I, II, III, IV, V, VII, VIII, X and XI of Defendant Pracna's counterclaim filed herein are dismissed with prejudice to the refiling thereof." (A-34)

This Court in its Mandate and Opinion declared that the portion of the trial Court's judgment as to Defendant Pracna's counterclaim "be in all things affirmed." *** The case is remanded for a new trial on the issue of **damages** in Count I of the amended petition ***." (A-36)

In its opinion on the Motion for Rehearing this Court noted that the Defendant Pracna had not appealed the judgment of the trial Court concerning her counterclaims. (A-37) The opinion also notes the plaintiff was entitled to a new trial for the purposes of assessing damages attributable to Defendant Pracna's (and Treveillian Heartfelt's) breach of contract. (A-39)

The Court of Appeals in Standard Insulation and Window Co. v. Dorrell, 309 S.W.2d 701 (MoApp. 1958) clearly stated that a set-off is a counterclaim and has the nature, characteristics and effect of an independent action or suit by the

defendant against the plaintiff. *See also*, Edmonds v. Stratton, 457 S.W.2d 228 (MoApp 1970).

This case is similar to First Nat. Bank of Ziegler, Ill. v. Dunbar, 72 S.W.2d 821 (MoApp. 1934). In that case, several appeals were taken, and in the second retrial, the court allowed the defendant to raise again a counterclaim to the plaintiff's claim. The Court in that case noted that since the verdict favoring the plaintiff on defendant's counterclaim was never set aside, that it was obvious that the defendant could not recover on his claim in the second trial.

The issue of payment was allowed into evidence to the jury in the second trial solely on the issue of outrageous conduct and not on the issue of a claim due. The Court has no authority to do other that what was directed by the opinion and mandate of the Court of Appeals. See, Morrison v. Caspersen, 339 S.W.2d 790 (Mo. 1960)

The Appellant in later arguments claimed that because the Respondent amended part of her Petition, that she opened the door to all the issues in the case, including the filing and claiming of the set-off or recoupment. This position misinterprets the mandate from the original appeal.

Does the Second Amendment to the pleadings as to the issue of damages on the contract count change the mandate and opinion of the Court of Appeals from the first appeal? The answer to this question is no! The Court

must direct itself to the opinion and mandate of the Court of Appeals for directions to proceed.

The Court in Bray v. St. Louis-San Francisco Ry. Co., 259 S.W.2d 132 (Mo.App. 1953) stated that:

> "'The law of the case' applies where a general principle of law is declared as applicable to the facts of the case. If it is remanded generally all issues are open to consideration on a new trial. * * * * A statement of the law is one thing and a determination of the **issues** tendered in the cause is another thing. **Where a case is reversed and remanded with specific directions to try certain issues only, all other issues are determined on the first appeal. * * * * The first states the 'law of the case'; the second is *res judicata final."***

The Court in Tillis v. City of Branson, 975 S.W.2d 949 (Mo.App. 1998) stated:

> "A mandate is to be read in conjunction with the appellate opinion filed in the case, and the trial court is **required** to follow the directions in conjunction therewith"

The Court in Outcom, Inc. v. City of Lake St. Louis, 996 S.W.2d 571 (Mo.App. 1999) stated:

> "The jurisdiction of the trial court on remand is determined by the mandate and opinion of the appellate court. * * * * A remand with directions

limits the trial court to enter judgment in conformity with the mandate. The trial court is without power to modify, alter, amend or otherwise depart from the appellate judgment, and any proceedings contrary to the directions of the mandate are null and void."

In this case the mandate was clear. The Appeals Court remanded this case after the first appeal for a new trial against the Defendant Timmi Pracna on the issue of damages only on Count 1 of the Plaintiff's Petition, the contract action on the bail bond contract. Nothing Plaintiff has done in its amendment changes that issue.

The Court of Appeals decision specifically denies Defendant Timmi Pracna's claim for any credit or return of the $58,500.00. (A-37)

Therefor as set forth, the Defendant Pracna is not entitled to any set-off against the Plaintiff's damages because such claim no longer exists.

CROSS APPEAL

POINT 2

THE TRIAL COURT ERRED IN AWARDING A SET-OFF OF $58,500 TO THE DEFENDANT PRACNA AGAINST THE JUDGMENT FOR THE PLAINTIFF TRIMBLE ON COUNT 1 BECAUSE MISSOURI LAW BARS A CLAIM FOR SET OFF MADE MORE THAN 5 YEARS AFTER IT ACCRUES AND IS BARRED BY *RES JUDICATA* IN THAT THE DEFENDANT PRACNA DID NOT INCLUDE THIS CLAIM FOR SET-OFF IN HER ANSWER UNTIL MORE THAN 5 YEARS FROM ITS ACCRUAL, AND THIS COURT AFFIRMED THE JUDGMENT FOR PLAINTIFF KAREN TRIMBLE ON DEFENDANT PRACNA'S PREVIOUS CLAIM FOR SET-OFF.

Missouri law as found in RSMo §516.120, provides that all actions upon contracts, obligations etc., must be brought within 5 years.

In Defendant Pracna's original answer (Supp.LF-517), she raised the issue of set-off or recoupment only in her counterclaims, specifically Count I. which requests the return of the $58,500.00 as money had and received, Count II, Count III, and Count IX, which requests credit against any amount owing to the Plaintiff Karen Trimble. However, Defendant Pracna did not raise this issue as an

affirmative defense in her answer to Count 1 of the Plaintiff's Petition which was tried in the first trial.

All testimony in this case in the first and second trial indicates that Ms. Pracna had sent Karen Trimble the $58,500 by September 8, 1995, thus accruing any claim she may have had on that date.

It was not until November 29, 2001, after Plaintiff Karen Trimble had received judgment on her behalf on all of Defendant Pracna's counterclaims, that Defendant Pracna for the first time raised a set-off or recoupment as an affirmative defense in her answer. (LF-67)

Therefore if this is what the trial Court used to base his decision to give a set-off to Defendant Pracna, the set-off claim was raised too late.

In the case of Chesterfield Village, Inc. v. City of Chesterfield, 64 S.W.3d 315 (MO 2002), the Supreme Court discussed when later claims in a suit are barred by *res judicata* by decisions in earlier litigation.

> They stated: "The Latin phrase *res judicata* means a thing adjudicated. The common-law doctrine of *res judicata* precludes relitigation of a claim formerly made." At 318. "The key question is, what is the thing—the claim or cause of action—that has previously been litigated? A claim is the aggregate of operative facts giving rise to a right enforceable by a court. The definition of a cause of action is nearly the same: a group of operative facts giving rise to one or more bases for suing. Whether referring to the

traditional phrase cause of action or the modern terms claim and claim for relief used in the pleading rules such as Rule 55.05, the definition centers on facts that form or could form the basis of the previous adjudication." At 318. "To determine whether a claim is barred by a former judgment, the question is whether the claim arises out of the same 'act, contract or transaction'" at 319.

This Court in its Opinion on the Motion for Rehearing noted that the basis for Defendant Pracna's claim against Karen Trimble concerning the $58,500 was an action for monies had and received. Defendant Pracna lost that claim before the jury and Court. This Court specifically stated: "The jury in this case determined defendant Pracna breached the contract on which plaintiff's Count I is based. **It likewise found defendant Pracna was not entitled to recovery from plaintiff on her Counterclaim Count IX for money had and received.**" (A-39)

The basis for a claim for money had and received is that money has been paid for which some type of return to the payee be made. In the first trial, the Defendant Pracna asked for cash back, but in the second trial she asked for credit back. Only the type of remedy requested changed, not the basis for the claim and this clearly shows that the claims are the same and are barred by *res judicata*.

The Respondent also directs this Court to the arguments contained in Point 1 as they concern the effect of the mandate and the fact that Plaintiff Karen Trimble

prevailed on **ALL** Defendant's Counterclaims, including the claim for the return of the moneys paid to Plaintiff.

Therefor as set forth, the Defendant Pracna was not entitled to any set-off against the Plaintiff's damages because such claim no longer existed.

CROSS APPEAL

POINT 3

THE COURT ERRED IN FAILING TO AWARD THE PLAINTIFF THE COST OF THE TRANSCRIPT FOR THE FIRST APPEAL BECAUSE MISSOURI LAW STATES THAT THE WINNER OF AN APPEAL SHALL HAVE THEIR COSTS AND BECAUSE IT IS A DAMAGE WITHIN THE BAIL BOND CONTRACT IN THAT HAVING WON THE FIRST APPEAL THE COST OF THE FIRST TRANSCRIPT WAS EITHER A COST OR AN EXPENSE RECOVERABLE UNDER THE BAIL BOND CONTRACT.

After prevailing in the first appeal, for some reason this Court did not award costs to the then appellant Karen Trimble for the cost of the transcript in that appeal, pursuant to Supreme Court Rule 84.18, which makes the awarding of the costs mandatory unless good cause is shown to deny the costs.

After winning at the second trial, the Plaintiff Karen Trimble presented to the trial court an affidavit concerning the costs incurred since the first trial, which this Court affirmed. That affidavit included in the Appendix at A-41.

The trial Court refused to award the plaintiff her costs of the original transcript on appeal.

In this case, while we recognize that this Court in Burdick v. Wood,

959 S.W.2d 951 (MoApp. 1998), held that the awarding of costs for appeal is not a matter within the jurisdiction of the trial Court, we believe that there is a difference in this case.

In the first appeal, this Court found that the Defendant Pracna was liable to the Plaintiff for damages under the bail bond contract. That contract Exhibit 1, states that those damages include:

> "To indemnify the Company against all liability, loss, damages, attorney fees and **expenses whatsoever**, including but not limited to *** which the Company may sustain or incur in making such bond, prosecuting or defending any action brought in connection therewith, and enforcing any of the agreements herein contained, and specifically enforcing any collateral or indemnifying agreement ***."

Thus while it might not be in the jurisdiction of the trial court to award this amount as costs, there is no reason why it should have not been awarded as an expense incurred in prosecuting or defending any action brought in connection with the bail bond contract.

This is especially clear in that the transcript on appeal was used during the second trial as testimony by four witnesses, Berry Jernigan, and Tony DeLaughter for the plaintiff and Todd Warf and Karen Griffin for the Defendant Pracna.

Therefore this Court should include the transcript amount in the judgment for expenses.

CROSS APPEAL

POINT 4

The trial court ERRED in awarding attorney fees to the Plaintiff upon the bail bond contract at the rate of 33½% on the jury award of $144,420 and not at an hourly method as requested

BECAUSE Missouri law would find that the bond contract was NOT ambiguous IN THAT the contract stated that the attorney fees were part of the Plaintiff's damages which arose from prosecuting or defending any action on the contract or protecting the collateral.

The portion which concerns attorney fees as damages is found in Paragraph 2 of the bail bond contract (Exhibit 1) which states:

> "To indemnify the Company against all liability, loss, damages, **attorney fees** and expenses whatsoever, including but not limited to *** which the Company may sustain or incur in making such bond, prosecuting or defending any action brought in connection therewith, and enforcing any of the agreements herein contained, and specifically enforcing any collateral or indemnifying agreement ***."

In Garner v. Hubbs, 17 S.W.3d 922 (MoApp. 2000), this Court stated that:

> "A contract is ambiguous only if its terms are susceptible of more that one meaning so that reasonable persons may fairly and honestly differ in their construction of the terms. *** the mere fact that the parties disagree on the interpretation of a contract does not render the document itself ambiguous. The test is whether the disputed language, in the context of the entire agreement, is reasonably susceptible to more than

one construction giving the words their plain and ordinary meaning as understood by a reasonable person *** Furthermore, an interpretation of a contract or agreement which involves unreasonable results, when a probable or reasonable construction can be adopted, will be rejected." At 927.

The Defendant suggests to the Court that this Court should interpret the bail bond contract as being ambiguous concerning the setting the attorney fees. Defendant Pracna suggests attorney fees in the amount of 33 ½% **of the amount collected by plaintiff attorneys from Defendant Pracna**. They would also ask the Court to apply this after Defendant Pracna's alleged set-off against the judgment of the jury.

The basis of this suggestion is that the second sentence of paragraph 2 of the bail bond contract is in some way ambiguous and should be construed against the Plaintiff. It states: "If upon failure of the parties to comply with any of the terms or conditions of this agreement and should it be necessary for the Company to refer this agreement to an Attorney for collection, the Parties agree to pay an attorney fee in the amount of 33½% whether or not such action proceeds to judgment." (Exhibit 1)

The first question the Court has to examine is what each of the sentences of paragraph 2 of the contract concern and the purpose the contract seeks to address.

This contract's purpose is to make the bondsperson whole in the event that the prisoner and his co-signer breach the contract. In this case, a return of all the liability, loss, or damages. If the bondsperson must pay an attorney fee which comes out of their proved damages, then they are not and cannot be made whole. The first sentence covers the attorney fees in prosecuting and defending on the contract.

The second sentence concerns the action then to collect. All attorney's realize that there are two parts to any litigation. First, getting the judgment and Second, collecting. Here once again, if the bondsperson has to pay additional attorney fees to collect, they will not be made whole. The only reason these issues come to light is when the prisoner and his co-signer have breached the agreement.

So, the bail bond contract is not ambiguous about attorney fees as damages. It clearly sets forth the areas in which an attorney fee will be due as damages, i.e. prosecuting or defending any action on the bond or any agreement therein, and protecting any collateral agreement.

The Plaintiff Karen Trimble submitted to the Court and jury attorney fees by the hour from Randall Wood (defending on the bond during the chase), Michael Morgan (defending the Washington suit on the collateral), Anthony Froehling (defending the Washington suit on the collateral) and R. Lynn Myers (defending the Washington suit on the collateral). Each of these bills was placed into evidence

and no objection was made that the bills were not admissible because of any ambiguity.

It was only after the jury portion of the trial, that the Court decided that the remainder of the attorney fees as damages for Karen Trimble would be limited to 33 1/2% of her contract damages.

The trial Court ruled that an ambiguity in the contract means that the Plaintiff is limited to attorney fees of 33 ½% and not the hourly fees she has paid. It never sets forth why there is an ambiguity and the nature of that ambiguity. This Court is clearly within its power to interpret this contract since it is clearly a matter of law, and should rule that no ambiguity exists and that the allowance of attorney fees should be consistent with the evidence, namely hourly.

Therefore the Appellant would request that this Court declare that the bail bond contract is not ambiguous and remand this matter to the trial Court to determine what the appropriate attorney fees are based upon an hourly fee.

RESPONDENT'S POINTS RELIED UPON

POINT I

The trial court DID NOT ERR in repeatedly sustaining objections to defendant's argument that Defendant Pracna did not owe the $25,000 balance of the bond premium and in telling the jury that Defendant Pracna owed that sum as a matter of law, BECAUSE whether Ms. Pracna owed the premium was not a disputed fact IN THAT this Court in its Mandate and opinion had determined that Defendant Pracna was liable on the bail bond contract which was a joint and several liability contract with Mr. Heartfelt and the trial Court in the first trial had determined as a fact established by the order of the Court that the premium for the bail bond was $32,500.

Point 1 of Ms. Pracna's appeal completely misstates the facts and the law in this case. It is simply attempt to avoid the terms of a contract that Ms. Pracna had signed.

The bail bond contract, Exhibit 1, signed by Treveillian Heartfelt and Timmi Pracna stated:

"Where this instrument is signed by more than one person, all such persons shall be both jointly and severally liable for the payment of any such sums incurred herein."

In Cohn vs. Dwyer, 959 S.W.2d 839 (Mo.App. 1997), the Court stated:

> "Defendants who are jointly and severally liable on a contract are individually liable for the entire amount of Plaintiff's damages * * * *. Thus the only issues the jury must decide when liability is joint and several are whether the Defendants where liable and if so, the amounts of the damages. Once the jury determines these issues, the trial Court must enter judgment against all the Defendants for the entire amount of the damages."

Missouri Courts have further indicated that where there is a joint undertaking, the responsibility on the part of all for a breach committed by anyone, all parties thereto are equally liable for damage sustained from the breach by one. *See*, Fox Midwest Theaters vs. Means, 221 F.2d 171 (8th Cir. 1955); Illinois Fuel Company vs. Mobile & O.R. Company, 8 S.W.2d 834.

Thus, in this case, there were only three questions to be answered by the Court or jury. First, were the Defendants jointly and severally liable for breaches of this contract. The answer is yes. The contract itself provided the specific provision concerning joint and several liability. This Court in its Mandate affirmed the liability of Timmi Pracna on the bail bond contract and the trial Court determined that Treveillian Heartfelt was liable on the bail bond contract by an interlocutory

judgment in default. This information was given to the jury in the very first statement by Mr. Crites who informed the jury without objection that "the trial Court had ordered that both Defendants, Timmi Pracna and Treveillian Heartfelt, are liable on the bail bond contract." (T-3)

Second, was the contract breached? The answer to this is yes. Treveillian Heartfelt failed to appear at Court and jumped bail. This was never an issue in this case.

Finally, as set forth in Cohn, what where the damages?

The bail bond contract provided that a bond premium was due, and the trial Court as noted by Ms. Pracna had previously determined that:

"That the total bond premium for the bonds written to obtain the release of

Defendant Treveillian Heartfelt was $32,500." (T-5)

Thus the issue for the jury to determine was what did Timmi Pracna **AND** Treveillian Heartfelt owe on the contract together, not separately. Finally, Defendant Timmi Pracna in a letter to her own attorney, acknowledged that she owed the bond premium. (A-27)

Thus there was no error in the trial Court preventing Ms. Pracna from confusing the jury with red herring issues of what she alone owed the Plaintiff Karen Trimble since Ms. Pracna also owed whatever Treveillian Heartfelt owed.

POINT II.

The trial court DID NOT abuse its discretion in refusing to submit defendant's withdrawal instruction, Instruction No. B, BECAUSE the withdrawal instruction would not have eliminated the issue of bounty hunter fees not actually paid or incurred by Trimble, IN THAT Instruction No. B would not have properly advised the jury that they should not consider any bounty hunter fees and expenses under Trimble's breach of contract claim because there was substantial evidence to support those fees.

Once again, Ms. Pracna attempts a red herring move on this Court. On Point II her entire position is that there was no substantial evidence at trial as it concerns bounty hunter fees and expenses not actually paid or incurred.

In Kenney v. Wal-Mart Stores, Inc., 100 S.W.3d 809, 814, (MO en banc, 2003) the Court stated:

> "Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of fact can reasonably decide the case."

The question before this Court is whether there was substantial evidence to submit the issue of bounty hunter fees and expenses to the jury, and the answer is an unqualified **YES!**

Among the Exhibits admitted into evidence **without** objection concerning the bounty hunter fees were:

Exhibit 103A	Suit by Tim Bruce for his fees and expenses; submitted by Pracna
Exhibit 113	Todd Warf's bill
Exhibit 127	Original petition showing bounty hunter fees and expenses; submitted by Pracna
Exhibit 222 A-C	Checks to Tim Bruce for time and expenses
Exhibit 223 A-K	Checks to Richard Hugh for time and expenses
Exhibit 223	Richard Hugh bill for bounty hunter services
Exhibit 224	Check to Larry Garrison for bounty expenses
Exhibit 221	Bill for Tony DeLaughter bounty hunter fees and expenses
Exhibit 471	Letter from Pracna to Atty. Grimm admitting to owning Hugh and Bruce for bounty hunter fees and expenses.

Besides this list of exhibits, each of the bounty hunters and Plaintiff Karen Trimble testified that Timmi Pracna promised to pay for their time not based upon Treveillian Heartfelt's capture. (T-456; T-458; T-483; T-958/959; T-1917) This is important given the fact that Pracna was also helping Heartfelt avoid capture during this same time.

While there is other evidence concerning this issue, these few items clearly indicate that there was sufficient substantial evidence to submit to the jury the damages concerning bounty hunter fees and expenses.

Instruction No. B as submitted by Defendant Timmi Pracna would have removed **all** fees and expenses, which is clearly not supported by the evidence. Even Defendant Timmi Pracna acknowledged that she owed Tim Bruce and Richard Hugh. (A-27)

Finally, the issue of the statute of limitations is another example of a red herring. Nowhere during this trial or the pleadings involving the trial was the issue of statute of limitations raised by the Defendant Pracna. Supreme Court Rule 55.08 specifically states that an affirmative defense of statute of limitations shall be pleaded. The defendant Pracna never objected to the evidence on the bounty hunter fees and expenses on the basis of the statute of limitations. Neither of the Defendant Pracna's Motions for Directed Verdict mention the statute of limitations. Missouri law is clear that failure to plead or even raise an affirmative defense during the trial results in the waiver of that defense. Detling v. Edelbrock, 671 S.W.2d 265 (MO 1984) The clear reason for this is that a party does not know to present evidence on an issue if it never was an issue.

In addition, the second trial was a retrial of the trial that took place in 1999, clearly when there was no issue of statute of limitations. To penalize the Plaintiff, because the trial court in the first trial committed error in failing to submit this issue to the jury, would be inequitable and allow the Defendant Timmi Pracna to avoid responsibility for her actions.

Therefore the trial Court did not err in refusing to submit Instruction No. B.

POINT III

The trial court DID NOT ERR in failing to sustain defendant Pracna's Motion for Judgment Notwithstanding the Verdict (JNOV), BECAUSE plaintiff did prove each essential element of her claim for fraud by substantial evidence, and in particular, the necessary elements that she reasonably relied upon the statements of

Ms. Pracna mentioned in the verdict directing instructions (Instruction Nos. 13-17) in either writing the bonds or hiring bounty hunters, that such statements were material to her decision to either write the bonds or hire the bounty hunters, or that she was damaged as a result of any representations of Ms. Pracna set out in the verdict directors, IN THAT this Court has already determined in its Mandate that the Plaintiff Karen Trimble had sufficient substantial evidence to submit her fraud claim against Timmi Pracna as it concerned writing the bonds and there was substantial evidence concerning the issue of the hiring and use of bounty hunters and there was evidence admitted without objection of Plaintiff Karen Trimble testified concerning the value of her time spent actually looking for Heartfelt and defending her collateral.

Defendant Pracna is correct in her standard of review of the denial of her Motion for Judgment Notwithstanding the Verdict. In the case of Giddens v. Kansas City Southern Railway Company, 29 S.W.3d 813, 818 (Mo. Banc 2000), the Court stated:

> "The standard of review of denial of a JNOV is essentially the same as for review of denial of a motion for directed verdict. A case may not be

submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence. In its determining whether the evidence was sufficient to support the jury's verdict, the evidence is viewed in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences in disregarding evidence and inferences that conflict with that verdict. This court will reverse the jury's verdict for insufficient evidence **only** where there is a complete absence of probative fact to support the jury's conclusion." (citations omitted)

Unfortunately what Defendant Pracna does is ignore all the evidence which does not support her theory in this point, and unlike the above case indicates does not view the evidence in the light most favorable to the Plaintiff. In this Court's opinion in the previous appeal Trimble v. Pracna, 51 S.W.3d 481 (MoApp., 2001), this Court specifically dealt with the issues of substantial evidence to submit the fraud count to the jury. Among other issues found by this Court was that there was substantial evidence concerning Heartfelt's alias' and whether he always appeared for court appearances. At 498-450.

I. Writing the bond.

In addition, what Defendant Pracna objects to are questions of fact and not a question of law. In Bigler vs. Conn, 959 S.W.2d 134, 138 (Mo.App. 1998), the Court stated: "We conclude here that the right to rely on a representation as to profitability of a business was a question for the trier-of-fact. The right to rely on a

representation is ordinarily a question of fact for the jury." *See also* Tietjens vs. General Motors Corp., 418 S.W.2d 75 (MO 1967). The Court in Bigler went on to state: "We conclude that the right to rely and whether in fact the party did, was a question for the jury." The Bigler case was a fraud suit was brought against the sellers of a business, concerning their representations of profitability.

Further the Courts in Missouri have stated :"The modern trend is to require less diligence, rather than more, in persons to whom representations are made and to condemn the falsehood of the person making the representation, rather than the credulity of the victim." Cantrell vs. Superior Loan Corp., 603 S.W.2nd 627, 637 (Mo.App. 1980) "The opportunity for investigation will not of itself preclude the right to rely." Tietjens vs. General Motors Corp., 418 S.W.2d 75 (MO 1967)." *See also,* Cabinet Distributors, Inc. v. Redmond, 965 S.W.2d 309, 313 (Mo.App. 1998).

The Defendant Pracna wishes to take from the jury the right to be the trier-of-fact in the case and have the trial Court decide the issues..

Were representations of fact made by Timmi Pracna, were those representations false, were those representations made so Karen Trimble would rely upon them in deciding to write the bail bonds on Treveillian Heartfelt and were the representations reasonably relied upon as they concern the writing of the bonds and hiring the bounty hunters? The answer is **yes**.

The Defendant Pracna focuses on two statements on reliance, taken out of context to support her position:

First, the statement that Karen Trimble relied upon the existence of the collateral in deciding to write the bonds.

Second, the discussion about Dianne Long and her statements about the aliases and Karen Trimble having enough collateral for the bonds.

The Defendant Pracna fails to take into consideration that in Plaintiff's Exhibit 1, the contract upon which the suit is based, the Defendants, Treveillian Heartfelt and Timmi Pracna, signed and agreed that "The undersigned Defendant and indemnators (hereinafter collectively referred to as parties) do hereby represent that the statements made herein and as inducement to A-Advance Bail Bonds (hereinafter referred to as Company) to execute the bond for, are true and the undersigned parties do hereby agree as follows:"

This was pointed out in this Court's decision in Trimble 1, at 499.
The evidence was that the Defendants, Timmi Pracna and Treveillian Heartfelt, filled out and signed the application for bail bond. (T-53/54) Karen Trimble testified that the information on the bond application is important and that she relied upon that information in making her decision to write the bond. (T-461)

Among the information provided in the application by Defendant Timmi Pracna was that the only nickname and/or alias for Treveillian Heartfelt was “Chance”. (Exhibit 1; T-447) The testimony of Officer Michael McNeil of the Ketchum, Idaho Police department, was that he had in 1989, discussed with Timmi Pracna the various identities for Treveillian Heartfelt. (T-1883) It is clear from the

bail bondsman, Mr. Michael McGann and the exhibits attached to his deposition Exhibits 46-A, 46-B, 46-C, 46-D and 46-E, that Timmi Pracna had previously posted bail for Treveillian Heartfelt under the names Gunther Chance Edelbauer, Guenther Edelbauer, Rick Arden Williams, and Francis Everheart. In addition, Timmi Pracna in her letter to Larry Garrison (Exhibit 201, Exhibit 430;**A-20**) which the fax indicates was sent on August 28, 1995, suddenly reveals for the first time that Treveillian Heartfelt is also known as Clifford Birchfield. Plaintiff Karen Trimble testified that if she had been told of the various aliases for Treveillian Heartfelt, she would not have bailed Treveillian Heartfelt out of jail and incurred any liability or damages. (T-447/448)

When Dianne Long told Karen Trimble that Treveillian Heartfelt had a rap sheet as long as Karen was tall, Timmi Pracna immediately discounted that information and told Plaintiff, Karen Trimble, that it was lie. (T-76/77; T-1310/1311) Yet, Timmi Pracna was aware that Treveillian Heartfelt was convicted of forgery (the charge which Pracna filed against Heartfelt) and burglary in Idaho. (T-1059) Timmi Pracna knew that Treveillian Heartfelt was guilty of charges that were brought against him in California, which were dropped in the plea agreement which sent him to the Idaho State Prison. (Exhibit 32-C) Even Timmi Pracna admits in her testimony that she told Karen Trimble that she didn't believe Heartfelt had any alias'. (T-1379)

Timmi Pracna wrote on the bond application Exhibit 1, on August 11, 1995, that Treveillian Heartfelt had been her employee and had lived with her for the last one-half year (6 months). In fact, Timmi Pracna testified that Treveillian Heartfelt left her home and employment around June 12, 1995. T-1172) That was nearly two months before he was jailed in Taney County, Missouri and Karen Trimble bailed him from jail. Timmi Pracna was aware that Treveillian Heartfelt had violated his parole by leaving the State of Idaho, and in fact reported in June, 1995, that he stole her Jeep. She then retracted that report. (Exhibit 41) Ms. Pracna in her testimony at this trial admitted that her retraction was in fact false and what she told the sheriff and his parole officer was a lie and that Heartfelt kept her Jeep until June 30. (T-1491/1494)

Timmi Pracna told Karen Trimble that Treveillian Heartfelt had always appeared for his court dates. (T-465) Karen Trimble testified that if she had know that Treveillian Heartfelt had skipped prior hearings, she would not have bonded him. (T-465) Timmi Pracna knew that Treveillian Heartfelt had missed prior court hearings and had in fact put Timmi Pracna at risk of losing a previous bond that she had previously posted for him. (Exhibit 67, **A-1**)

Timmi Pracna wrote that she had annual income of $100,000+. Karen Trimble testified that she relied upon that information to write the bond. This was not true as shown by among other evidence by Exhibit 17, which showed her actual income as $5,960. (T-452/453) Timmi Pracna told Karen Trimble that Heartfelt was not in

violation of his parole because Heartfelt had permission from his parole officer to go to Tennessee, and Karen Trimble testified that she relied upon that statement. (T-464) Yet as shown above, Timmi Pracna not only knew he was in violation of his parole, Timmi Pracna assisted him to flee his parole. In each instance, Karen Trimble testified that she would not have written the bond if she had known the truth.

Therefore, as can be seen by the facts in evidence, Plaintiff testified that she reasonably relied on a number of statements of fact in issuing the bond, facts which turned out to be false and known by Timmi Pracna to be false. The contract clearly indicates that the information and facts written in the application should be correct and that the information and facts would be reasonably relied upon as an inducement to issue the bonds.

II. Bounty Hunters

Again Defendant Pracna would have this Court ignore all the testimony concerning the bounty hunter fees and expenses and simply say no evidence exists.

While there is evidence about fees of retrieval under the bond contract Exhibit 1, there is also evidence by Timmi Pracna that she insisted bounty hunters be hired to find Heartfelt.

Early in the testimony of Karen Trimble she testified that Pracna wanted more bounty hunters. (T-193) Trimble then testified that she advised Timmi Pracna that it was going to cost money to find Heartfelt, and Timmi Pracna promised that she would pay whatever it cost. (T-194/195) Later Karen Trimble

testified that as the bills grew she continually questioned Timmi Pracna about paying the fees and expenses and Karen Trimble stated that Timmi Pracna always assured her that all the bills would be paid. (T-456) More importantly, is that Timmi Pracna never denies any of these statements from Karen Trimble nor the bounty hunters.

Karen Trimble testified that she relied upon these promises. (T-457) Further, she testified that she would not have spent as much or as much time a trying to find Heartfelt if she had known these statements were not true. (T-458/459)

Timmi Pracna in Exhibit 200 (A-18) acknowledged the effort and her decision to hire bounty hunters. Further, Timmi Pracna advised her attorney Tom Grimm in Exhibit 471 that she owed Richard Hugh and Tim Bruce money for their efforts, yet she continues to deny to this day that she should pay them.

III. Damages

Finally, Defendant Pracna attempts to highlight one and only one issue of damages for Karen Trimble in order to convince this Court that there were no other damages which could support the submission of fraud to the jury.

What Ms. Pracna chooses to ignore is that all the damages with the possible exception of the bond premium would support the submission of the fraud. As in many cases, damages may be recovered under more than one theory. The

Defendant Timmi Pracna seeks to frame her position not on the issue of substantial evidence to submit, but on what the jury did with the submissions and evidence.

Originally, in her brief to the Court of Appeals, Defendant Pracna's position was that the evidence was submissible under both the contract and the fraud theories and that Plaintiff was required to elect which theory under which to collect those damages. In this case, that was the very reason that Plaintiff and Defendant added the tail on Instruction No. 18. It instructed the jury not to award Karen Trimble any of the damages that they had already awarded her under the Verdict A. In addition, in the closing arguments, we discussed what the tail meant with the jury, and again told them that they could award an item of damages only once. Counsel for Timmi Pracna jointly submitted Instruction No. 18 and made no objection to our explanation in our closing.

Most of the testimony and exhibits concerning damages came in to evidence without objection, thus fulfilling the substantial evidence requirement.

Those portions of Defendant Pracna's brief concerning the claim for "loss of income" mischaracterize the type of damage the jury awarded Karen Trimble. The damage submitted to the jury without objection was the value of the time actually spent by Karen Trimble searching for Heartfelt and the time defending herself from Pracna. This is clearly time and services she would not have had, if the Defendant Pracna had simply been truthful. Plaintiff testified how she spent this time, the amount of time used and its value. (T-506/512)

Plaintiff Karen Trimble had testified how she spent the time looking for Treveillian Heartfelt after the Defendant Timmi Pracna helped him run. In her testimony found in the transcript from page 506 to page 512, she identified what was on Exhibit 214 and the number of hours spent and finally she states that the value of her time in looking for Treveillian Heartfelt was $30.00 per hour, not $400 per day as set forth by Defendant Pracna. Did Defendant Pracna want Plaintiff working to find Treveillian Heartfelt. Of course. In Exhibit 200, (A-18), the Defendant Pracna even gives Karen Trimble a "to do list" Defendant Pracna was also constantly calling the Plaintiff to check on her activities.

While the lost income was probably not explained as clearly in the pleadings, all the evidence of her activities and their value came into evidence without objection. This type of claim sounds in quantum meruit. The Missouri courts have stated that to recover for this, the plaintiff must prove what services were provided and the reasonable value of those services. Hart v. Wood, 392 S.W.2d 20 (MoApp. 1965)

Thus the discussion of lost profits is incorrect and merely another red herring. In addition, since there was evidence of actual damages which the jury found, the punitive damage award (which was not appealed) is supported as required by Missouri law.

Therefore it is clear that Plaintiff Karen Trimble met all her evidentiary requirements to submit the issues of fraud against the Defendant Timmi Pracna.

POINT IV

The trial court DID NOT ERR in submitting Instruction No. 13 BECAUSE the instruction was supported by substantial

evidence and it did not confuse, mislead or misdirect the jury IN THAT there was evidence that plaintiff was told by Heartfelt and Pracna that Mr. Heartfelt had not used aliases and that fact was relied upon and it was material to plaintiff when she wrote the bail bonds for him.

In the case of Giddens v. Kansas City Southern Railway Company, 29 S.W.3d 813, 818 (Mo. Banc 2000), the Court stated:

> "In its determining whether the evidence was sufficient to support the jury's verdict, the evidence is viewed in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences in disregarding evidence and inferences that conflict with that verdict. This court will reverse the jury's verdict for insufficient evidence **only** where there is a complete absence of probative fact to support the jury's conclusion." (citations omitted)

Unfortunately what Defendant Pracna does is ignore all the evidence which does not support her theory in this point. In this Court's opinion in the previous appeal Trimble v. Pracna, 51 S.W.3d 481 (MoApp., 2001), this Court specifically dealt with the issues of substantial evidence to submit the fraud count to the jury. Among other issues found by this Court was that there was substantial evidence concerning Heartfelt's alias' and whether he always appeared for court appearances.

At 498-450. The evidence at this trial was literally the same on this issue as at the first trial.

What Defendant Pracna objects to are questions of fact and not a question of law. In Bigler vs. Conn, 959 S.W.2d 134, 138 (Mo.App. 1998), the Court stated: "We conclude here that the right to rely on a representation as to profitability of a business was a question for the trier-of-fact. The right to rely on a representation is ordinarily a question of fact for the jury." *See also* Tietjens vs. General Motors Corp., 418 S.W.2d 75 (MO 1967). The Court in Bigler went on to state: "We conclude that the right to rely and whether in fact the party did, was a question for the jury." The Bigler case was a fraud suit was brought against the sellers of a business, concerning their representations of profitability.

Further the Courts in Missouri have stated: "The modern trend is to require less diligence, rather than more, in persons to whom representations are made and to condemn the falsehood of the person making the representation, rather than the credulity of the victim." Cantrell vs. Superior Loan Corp., 603 S.W.2nd 627, 637 (Mo.App. 1980) "The opportunity for investigation will not of itself preclude the right to rely." Tietjens vs. General Motors Corp., 418 S.W.2d 75 (MO 1967)." *See also,* Cabinet Distributors, Inc. v. Redmond, 965 S.W.2d 309, 313 (Mo.App. 1998).

The Defendant Pracna wishes to take from the jury the right to be the trier-of-fact in the case and have the trial Court decide the issues..

Were representations of fact about the Heartfelt alias's made by Timmi Pracna, were those representations false, were those representations made so Karen Trimble would rely upon them in deciding to write the bail bonds on Treveillian Heartfelt and were the representations reasonably relied upon? The answer is **yes**.

The Defendant Pracna fails to take into consideration that in Plaintiff's Exhibit 1, the contract upon which the suit is based, the Defendants, Treveillian Heartfelt and Timmi Pracna, signed and agreed that "The undersigned Defendant and indemnators (hereinafter collectively referred to as parties) do hereby represent that the statements made herein and as inducement to A-Advance Bail Bonds (hereinafter referred to as Company) to execute the bond for, are true and the undersigned parties do hereby agree as follows:"

This was pointed out in this Court's decision in Trimble 1, at 499. The evidence was that the Defendants, Timmi Pracna and Treveillian Heartfelt, filled out and signed the application for bail bond. (T-53/54) Karen Trimble testified that the information on the bond application is important and that she relied upon that information in making her decision to write the bond. (T-461)

Among the information provided in the application by Defendant Timmi Pracna was that the only nickname and/or alias for Treveillian Heartfelt was “Chance”. (Exhibit 1; T-447) The testimony of Officer Michael McNeil of the Ketchum, Idaho Police department, was that he had in 1989, discussed with Timmi Pracna the various identities for Treveillian Heartfelt. (T-1883) It is clear from the

bail bondsman, Mr. Michael McGann and the exhibits attached to his deposition Exhibits 46-A, 46-B, 46-C, 46-D and 46-E, that Timmi Pracna had previously posted bail for Treveillian Heartfelt under the names Gunther Chance Edelbauer, Guenther Edelbauer, Rick Arden Williams, and Francis Everheart. In addition, Timmi Pracna in her letter to Larry Garrison (Exhibit 201, Exhibit 430;**A-20**) which the fax indicates was sent on August 28, 1995, suddenly reveals for the first time that Treveillian Heartfelt is also known as Clifford Birchfield. Plaintiff Karen Trimble testified that if she had been told of the various aliases for Treveillian Heartfelt, she would not have bailed Treveillian Heartfelt out of jail and incurred any liability or damages. (T-447/448)

When Dianne Long told Karen Trimble that Treveillian Heartfelt had a rap sheet as long as Karen was tall, Timmi Pracna immediately discounted that information and told Plaintiff, Karen Trimble, that it was lie. (T-76/77; T-1310/1311) Yet, Timmi Pracna was aware that Treveillian Heartfelt was convicted of forgery and burglary in Idaho. (T-1059) Timmi Pracna knew that Treveillian Heartfelt was guilty of charges that were brought against him in California, which were dropped in the plea agreement which sent him to the Idaho State Prison. (Exhibit 32-C)

Therefore, as can be seen by the facts in evidence, Plaintiff testified that she reasonably relied on a the issue of alias' in issuing the bond, facts which turned out to be false and were known to be false by Defendant Pracna. The contract clearly

indicates that the information put down in the application should be correct and that the information would be reasonably relied upon as an inducement to issue the bonds.

POINT V

The trial court DID NOT ERR in submitting Instruction No. 15, BECAUSE Instruction No. 15 DID NOT misdirect, mislead, or confuse the jury and thereby prejudiced defendant Pracna by permitting the jury to return a verdict against her because there was

substantial evidence supporting the instruction, IN THAT (a) it was permitted for plaintiff Trimble to recover damages on her fraud and contract claims despite the fact that the same facts supported each claim as long as the damages were not doubled thereby, and (b) the requisite elements of falsity, materiality, reliance, and damages were proven by substantial evidence.

Plaintiff Karen Trimble will not repeat for the third time all of the facts and law set forth in her brief as covered by Points II and III which have already discussed that there was substantial evidence concerning the submission of Instruction No. 15 for fraud on the bounty hunter fees and expenses, as well as the damages suffered thereby.

What is most intriguing is that the Appellant has now switched tactics and theories on this particular point. In the first brief, the Appellant took the position that Plaintiff must elect theories because the damage evidence applied to the submission of both contract and fraud theories. This point was the basis for the Court of Appeals decision.

For convenience of the Court we restate the Appellant's position and then discuss why that position is incorrect.

The Appellant stated:

"Claims When the Same Core Facts Were At Issue in Both Claims

Instruction No. 15 prejudiced defendant Pracna in that it permitted the jury to award plaintiff Trimble damages in contract and fraud based upon the same set of operative facts, thereby giving plaintiff Trimble a windfall and double recovery. Because the same damages are involved in plaintiff Trimble's contract claim and in Instruction No. 15, Trimble should have been required to elect between her fraud and contract theories. She would have received a single recovery based on a single set of facts. Instead, the trial court improperly submitted Instruction No. 15 and thereby prejudiced Pracna by permitting the jury to award contract and fraud damages based on the same expense.

A number of cases recognize that a party may not recover damages in both fraud and contract when the facts and damages underlying each claim are identical. For example, in Vogt v. Hayes, 54 S.W.3d 207, 211 (Mo.App. 2001), this Court held:

> *The Vogts may recover for both a breach of contract and a claim for fraudulent inducement to make a contract. The Vogts are entitled to be made whole by one compensatory damage award, but not to the windfall of a double recovery. If the proven damages for both the breach of contract and for the tort are the same, then the damage award merges.*

See also Greenwood Ranches, Inc. v. Skie Constr. Co., 629 F.2d 518, 521 (8th Cir. 1980) ("Greenwood's causes of action are simple alternate theories for seeking

the same relief. In this situation, a plaintiff is not entitled to a separate compensatory damage award under each legal theory. On the contrary, he is entitled only to one compensatory damage award if liability is found on any or all of the theories involved.").

Finally, in R.J.S. Security, Inc. v. Command Security Services, Inc., 101 S.W.3d 1 (Mo.App. 2003), a bench trial, the respondents challenged the trial court's decision barring their breach of contract counterclaim on the ground that it was based on the same theory and facts as their fraud counterclaim. Id. at 17. The appellate court ruled that the trial court did not err:

> *It is true that a party may pursue multiple theories of liability, however, a party may not recover duplicative damages for the same wrong. While entitled to be made whole by one compensatory damage award, a party may not receive the windfall of a double recovery, which is a species of unjust enrichment and is governed by the same principles of preventive justice. Here, Respondents were allowed to present to the trier of fact claims for fraud and breach of warranty against Appellant, both of which relied upon the same wrong and the same item of damages . . . As noted herein, the damages gave Respondents the benefit of their bargain . . . The trial court did not err in allowing one recovery for the same wrong. Id.*

The principles enunciated in Vogt, Greenwood, and Command Security apply with equal weight here. Certainly it would have been permissible for Trimble to submit fraud and contract claims if those claims were based upon different facts and asserted different wrongs. The problem here, however, is that Instruction No. 15 is based upon the same facts, and alleges the same wrong, as Instruction No. 9 of Trimble's breach of contract claim. It is clear that plaintiff recovered her bounty hunter fees and expenses under Instruction No. 9, and Instruction No. 15 misled, misdirected, and confused the jury by telling them that the same bounty hunter fees and expenses awarded in Instruction No. 9 could also be considered in Instruction No. 15. Because plaintiff Trimble is forbidden from receiving a windfall or double recovery based upon the same facts under two different theories, Instruction No. 15 was improper and should not have been submitted to the jury in conjunction with Instruction No. 9.

Furthermore, Instruction No. 18, which instructed the jury that the same damages could not be awarded under the fraud and contract claims, does not remedy the problems with submitting Instructions 9 and 15 together. In relevant part, Instruction No. 18 states:

> *"You may not assess any damages on Verdict Form B, which you already have assessed on Verdict Form A, or which is referred to in Instruction No. 11."*

Instruction No. 18 is not sufficient because it does not instruct the jury that, if the only damages sustained by plaintiff relating to the bounty hunters were the same damages as awarded under Instruction No. 9, then Instruction No. 15 could not support a verdict. Most importantly, Instructions No. 9, 15, and 18 prejudiced defendant Pracna by leaving the issues of fraud and breach of contract based on the bounty hunter fees and expenses to the jury when, as a matter of law, the trial court should have required plaintiff to elect a single remedy based upon a single set of facts. With the instructions as submitted, there is no way to guarantee that a double recovery did not occur since the jury awarded damages for fraud and breach of contract. Because only a single set of facts was involved in Instruction No. 15, and because those facts duplicated facts for which recovery was sought in Instruction No. 9, the trial court erred as a matter of law in permitting submission of Instruction No. 15."

However, the problem with the Appellant's first position is that they failed to raise this issue at the proper time and in the proper manner.

In the decision of the Missouri Supreme Court, Boyd v. A.E. Margolin, 421 S.W.2d 761 (MO 1967) the Court stated:

> "The answer filed here does not raise any issue that Boyd be required to elect upon which counts of his petition he was going to submit his case. **The matter of an election of remedy is required to be pleaded affirmatively as a defense.** * * * At least, an appropriate motion to require

Boyd to elect at the close of the evidence should have been made so that the matter of what should have been submitted to the jury would have been called to the attention of the Court." at 768. (Emphasis added)

"The difficulty with appellant's cross-appeal position here is that Mr. Kraus in no way urged in the trial court that Boyd elect between his pleaded theories. He sat by and allowed him to submit both theories to the jury * * *. Not having called the attention of the trial court to any imperfection of submission of theories to the jury, these appellants must be deemed to have waived the same." At 768, 769.

The Defendant Pracna in our case is in the same situation as was Mr. Kraus in Boyd, above. The Boyd case is directly on point in that it concerned theories of recovery which the Supreme Court deemed to be inconsistent.

In the case of Citizens Bank of Appleton City v. Schapeler, 869 S.W.2d 120 (MoApp. 1993) this rule of law is again reaffirmed. In that case the party appealing had at least mentioned the issue in a pretrial hearing and in its Motion for New Trial. However, the Court noted:

"While appellant raised this issue both at the beginning of trial and in his Motion for New Trial, **THE POINT WAS NOT PROPERLY PRESERVED**. **Election of remedies must be pleaded or be raised by a motion to strike or by a motion to elect at the close of all the evidence.**

*** * * If it is not so raised, the objection is deemed WAIVED**. (Emphasis added) Because appellant did not raise this objection at the close of all the evidence, the point was not properly preserved and is deemed waived." at 125.

See also, Motley v. Dugan, 191 S.W.2d 979 (MoApp. 1945); State ex rel. Kansas City v. Harris, 212 S.W.2d 733 (MO 1948); Sunset Pools of St. Louis, Inc. v. Schaefer, 869 S.W.2d 883 (MoApp. 1994); 63 U.M.K.C. Law Rev. 599 The Doctrine of Election of Remedies in Missouri

Now, in examining the pleadings set forth in the Legal File, we find that Appellant, Timmi Pracna did **not** raise the affirmative defense of election of remedies in her answer. (Supp. L.F.- 517) She did **not** file a motion to dismiss or strike raising this issue. If the Court looks at the docket at page 22 of the Legal File, it will be found that there was **no** motion to strike and **no** motion to elect at the close of the evidence was ever filed by the appellant, Timmi Pracna. **Nor** was this issue mentioned in the Appellant's Motion for Directed Verdict at the Close of Plaintiff's Evidence (Legal File 288-293) or the Appellant's Motion for Directed Verdict at the Close of All Evidence (Legal File 294-299) IN FACT IT WAS NOT UNTIL Appellant's Motion for New Trial that the Appellant states that: "The Court erred in permitting cumulative verdicts to be rendered on alternative theories of liability." (Legal File 345) **THUS IT IS COMPLETELY CLEAR THAT THE APPELLANT TIMMI PRACNA WAIVED THIS ISSUE.**

Just as important, the Court submitted to the jury Instruction No. 18 which clearly instructs the jury to not award double damages. Not only did the Appellant not object to this instruction, but **THIS WAS AN INSTRUCTION JOINTLY SUBMITTED TO THE JURY BY THE APPELLANT.** (Transcript pg. 1566) Missouri law has **always** held that a party cannot object to issues that they have submitted in instructions to the jury upon.

The Appellant's new tactic appears to take the exact opposite position and declare that since the jury awarded the bounty hunter fees on Count 1, then there were no longer any damages for the fraud count. This is clearly a specious argument, since the error complained of is that the trial Court submitted Instruction NO. 15 to the jury. At the time of the submission, there was no decision by the jury awarding damages under any theory. Thus the trial Court could not be convicted of anticipatory error concerning the way the jury found the damages.

POINT VI

The trial court DID NOT ERR in awarding attorney fees of $48,380.70 BECAUSE the bond contract was NOT ambiguous IN THAT the contract stated that the attorney fees were part of the Plaintiff's damages which arose from prosecuting or defending any action on the contract or protecting the collateral.

Before discussing the legal and factual aspects of this point, the Respondent would move the Court to strike and dismiss the claim under this Point in that this point fails to set forth the legal reasons for the alleged error as required by Supreme Court Rule 84.03(d).

Defendant Pracna starts her argument on this point by attempting to direct this Court to only the last portion of the paragraph in the contract (Exhibit 1) concerning the attorney fees. Her quote concerns an attorney fee for **collecting** from the Defendant, not the stage of the litigation we are engaged in presently.

The portion which concerns attorney fees as damages is found in Paragraph 2 of the bail bond contract (Exhibit 1) which states:

> "To indemnify the Company against all liability, loss, damages, **attorney fees** and expenses whatsoever, including but not limited to *** which the Company may sustain or incur in making such bond, prosecuting or defending any action brought in connection therewith, and enforcing any of the agreements herein contained, and specifically enforcing any collateral or indemnifying agreement ***."

In Garner v. Hubbs, 17 S.W.3d 922 (MoApp. 2000), this Court stated that:

> "A contract is ambiguous only if its terms are susceptible of more that one meaning so that reasonable persons may fairly and honestly differ in their construction of the terms. ***

> the mere fact that the parties disagree on the interpretation of a contract does not render the document itself ambiguous. The test is whether the disputed language, in the context of the entire agreement, is reasonably susceptible to more than one construction giving the words their plain and ordinary meaning as understood by a reasonable person *** Furthermore, an interpretation of a contract or agreement which involves unreasonable results, when a probable or reasonable construction can be adopted, will be rejected."
>
> At 927.

The Defendant suggests to the Court that this Court should interpret the bail bond contract as setting the attorney fees for the Plaintiff in the amount of 33 ½% **of the amount collected by plaintiff attorneys from Defendant Pracna**. They would also ask the Court to apply this after Defendant Pracna's alleged set-off against the judgment of the jury.

The basis of this request is that paragraph 2 of the bail bond contract is in some way ambiguous and should be construed against the Plaintiff.

First, as will be more completely explored in the Cross-Appeal, the bail bond contract is not ambiguous about attorney fees as damages. It clearly sets forth the areas in which an attorney fee will be due as damages, i.e. prosecuting or

defending any action on the bond or any agreement therein, and protecting any collateral agreement.

The Plaintiff Karen Trimble submitted to the Court and jury attorney fees by the hour from Randall Wood (defending on the bond during the chase), Michael Morgan (defending the Washington suit on the collateral), Anthony Froehling (defending the Washington suit on the collateral) and R. Lynn Myers (defending the Washington suit on the collateral). Each of these bills was placed into evidence and no objection was made that the bills were not admissible because of any ambiguity.

It was only after the jury portion of the trial, that the Court decided that the remainder of the attorney fees as damages for Karen Trimble would be limited to 33 1/2% of her damages.

However, the Defendant forgets the Mandate of the Court of Appeals in this case, which was to try Count 1 on the issue of **Plaintiff's** damages, not Plaintiff's damages less a claim for set-off by Defendant Pracna. Defendant Pracna's counsel argues that the issue of damages must necessarily include the set-off, but this is incorrect.

As in the first trial Defendant Pracna is asking the Court to vary the verdict of the jury to something else. Here the jury clearly stated that Plaintiff's damages, not including the attorney fees required by Paragraph 2 of the contract were

$144,420.00. This would make the attorney fees for Plaintiff to be $48,380.70 plus expenses of $12,324.67, under the percentage method used by the trial Court.

The trial Court ruled that the ambiguity in the contract means that the Plaintiff is limited to attorney fees of 33 ½% and not the hourly fees she has paid. We will discuss this issue further in the Cross-Appeal wherein the Plaintiff contends that the attorney fees awarded as damages should have been the hourly fee she is paying. Defendant Pracna asks the Court to rule that her claim is a part of Plaintiff's claim which it is not.

The Court of Appeals in Standard Insulation and Window Co. v. Dorrell, 309 S.W.2d 701 (MoApp. 1958) clearly stated that a set-off is a counterclaim and has the nature, characteristics and effect of an independent action or suit by the defendant against the plaintiff.

Thus while the trial Court may have found an ambiguity in the contract in the amount of attorney fees, the law is that Defendant Pracna's claim for set-off is independent of Plaintiff's damages not a part thereof.

CONCLUSION

The Respondent, Cross-Appellant, Karen Trimble for the reasons set forth in this Brief, requests that this Court grant the following:

1. Affirm the trial Court's Judgment in all aspects, except to:
    a. Reverse the allowance of a $58,500 set-off to the Defendant Pracna against the judgment for Karen Trimble on Count 1 of her suit against the Defendants Heartfelt and Pracna;
    b. Award to Karen Trimble her costs of the transcript from the first appeal as an expense under the bail bond contract; and
    c. Remand the case to the trial Court to determine a fair and

reasonable attorney fee pursuant to the bail bond contract on an hourly basis.

Respectfully submitted:

By:_____
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IN THE MISSOURI SUPREME COURT

KAREN F. TRIMBLE	)	
Respondent/	)	
Cross-Appellant,	)	
vs.	)	Appeal Nos. SC86269
	)	
TIMMI ANN PRACNA,	)	
Appellant/	)	
Cross-Respondent.	)	

CERTIFICATE OF COMPLIANCE WITH RULE 84.06, SPECIAL RULE NO. 1 AND CERTIFICATE OF SERVICE

STATE OF MISSOURI)
) ss .
COUNTY OF GREENE)

Pursuant to Rule 84.06(c) and Special Rule No. 1, counsel for Respondent/Cross Appellant certifies that this brief complies with the limitations contained therein. There are 17,963 words in this brief. Counsel for Respondent/Cross Appellant relied on the word count of his word processing system in making this certification.

Pursuant to said Rules, counsel for Respondent/Cross Appellant certifies that the disk filed herewith has been scanned for viruses and is virus-free.

Further, counsel for Respondent/Cross Appellant states that Respondent/Cross Appellant's opening brief in the within cause was by him caused to be served, either by hand delivery or by ordinary mail, postage prepaid, in the following stated number of copies, addressed to the following named persons at the addresses shown, all on the 4th day of November, 2004:

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Subscribed and sworn to before me this 4t^{h} day of November, 2004.

_____

Notary Public

My commission expires: